

USDOL/OALJ Reporter

[*Willy v. The Coastal Corp.*](#), ARB No. 98-060, ALJ No. 1985-CAA-1 (ARB Nov. 6, 2002)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 98-060
(Formerly ARB CASE NO. 97-107)
ALJ CASE NO. 85-CAA-1
DATE: NOV 6 2002

In the Matter of:

DONALD J. WILLY,
COMPLAINANT,

v.

THE COASTAL CORPORATION AND
COASTAL STATES MANAGEMENT CO.,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

**ORDER REQUESTING BRIEFING BY THE ASSISTANT
SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH
AND
ADDITIONAL BRIEFING BY COMPLAINANT AND RESPONDENTS**

The Administrative Review Board (ARB), with considerable reluctance, requests additional briefing in this case. The parties have endured a lengthy adjudicative history spanning more than sixteen years. The current Members of the Board are placing the highest priority on the older cases. We are committed to adjudicating the *Willy* case in an expeditious and reasoned manner. Nonetheless, we conclude that the minimal delay resulting from this Order is warranted due to the importance of the issues raised.

The ARB has reviewed the facts and the numerous legal issues in the case and concludes that the application of longstanding common law principles concerning attorney-client privilege in the context of the federal whistleblower protection statutes presents a significant issue of first impression. We are seeking the views of the Assistant Secretary, Complainant and Respondents and others who may wish to file friend of the court briefs and believe the Board's deliberations will be aided by the arguments provided.

This case arose when Complainant Donald J. Willy filed a complaint alleging that Respondents, Coastal Corporation and Coastal States Management Co., terminated his employment as an in-house legal counsel in retaliation for activities Willy asserted were protected by the whistleblower provisions of several environmental statutes.¹ To establish entitlement to relief under the whistleblower provisions of the environmental statutes, a complainant must prove, by a preponderance of the evidence, that he engaged in protected conduct and that the employer took adverse action against him because of the protected conduct.

Willy, in support of his claim that he engaged in protected conduct, seeks to rely upon an "environmental audit" of the Florida oil storage and supply facilities of Respondents' subsidiary, the Belcher Oil Company. Willy participated in earlier drafts of this audit ["the Belcher report"] (CX 81, 84) in the course of his employment as Respondents' in-house legal counsel.

[Page 2]

Coastal argues (in regard to the evidentiary use of Willy's Belcher Report drafts) that testimony and other evidentiary use of the drafts are privileged under the evidentiary rules of attorney-client privilege/confidentiality and the ethical duty of client confidentiality. (Willy also had requested production of other evidence that Coastal did not produce on the grounds of attorney-client work product and privilege.)

Accordingly, this case raises novel and important issues involving standards of attorney-client confidentiality, including: (1) the applicability of the evidentiary attorney-client privilege to cases arising under the whistleblower provisions of the environmental whistleblower statutes and (2) the ethical duty of confidentiality that falls outside the attorney-client privilege. *See Siedle v. Putnam Investments, Inc.*, 147 F.3d 7 (1st Cir. 1998); *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997); *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983), *reh'g denied*, 717 F.2d 1399 (1983); *X Corp. v. Doe*, 816 F. Supp. 1086 (E.D. Va. 1993) (*X Corp. II*); *X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992) (*X Corp I*), *aff'd sub nom. Under Seal v. Under Seal*, 17 F.3d 1435 (4th Cir. 1994); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000); *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994); *Wise v. Consolidated Edison Co. of New York, Inc.*, 723 N.Y.S.2d 462 (App. Div. 2001); *Willy v. Coastal States Management Co.*, 939 S.W.2d 193 (Tex. App. 1996), *writ diss'd*, 977 S.W.2d 566 (Tex. 1998); ABA Formal Opinion 01-424, "A Former In-House Lawyer May Pursue a Wrongful Discharge Claim Against Her Former Employer and Client As Long As Client Information Properly Is Protected" (Sept. 22, 2001).

The conflict between longstanding federal common law upholding the attorney/client privilege and a federal statute and policy enacted to protect the safety of the public and workers by prohibiting employers from retaliating against employees who raise safety/environmental concerns has been a central issue throughout the lengthy process in

the *Willy* case. This issue as it relates to Willy has been addressed in federal administrative decisions and in the State courts.

Procedural History

Federal Courts and Administrative Bodies

In 1984, Willy filed a whistleblower complaint with the Department of Labor's Wage and Hour Division (WHD). WHD found for Willy and ordered his reinstatement. Coastal appealed the ruling to a Department of Labor Administrative Law Judge (ALJ). Willy sought to introduce various drafts of his Belcher Report into evidence and Coastal objected on the basis of attorney-client privilege. The ALJ rejected Coastal's privilege claims and ordered production of the documents. ALJ Order, February 27, 1985. Coastal refused to produce the documents and the ALJ ordered Willy to pursue the production order in U.S. District Court. Willy filed a motion in the U. S. District Court in Texas.

In 1985, prior to the District Court decision on the merits of enforcement of the production order, Coastal filed a motion with the ALJ asking that the case be dismissed on the basis of a Fifth Circuit U.S. Court of Appeals decision in *Brown & Root v. Donovan*, 747 F.2d 1029, 1036 (5th Cir. 1984). The Fifth Circuit found that under the whistleblower provisions of the Energy Reorganization Act "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected." 747 F.2d at 1036. Thus, the ALJ dismissed the case, finding Willy's actions solely internal and therefore unprotected. ALJ Recommended Decision and Order, May 6, 1985.

[Page 3]

Willy appealed to the Secretary of Labor and in 1987 the Secretary reversed the ALJ's decision and found that, notwithstanding the Fifth Circuit's opinion in *Brown & Root*, Willy's actions on the Belcher Report constituted protected activity. The Secretary also found that lawyers are covered under the whistleblower acts. The Secretary remanded the case to the ALJ for further consideration. Secretary's Decision and Order of Remand, (Sec'y D. & O. of Rem.) June 4, 1987.

Again, Coastal raised the issue of attorney-client privilege during the ALJ's remand. The ALJ again ordered Willy to go to U.S. District Court to enforce a production of documents order and resolve the privilege claims. Instead, Willy petitioned the Fifth Circuit pursuant to the All Writs Act. The Secretary of Labor objected on the basis that the issue was not ripe for adjudication. The Fifth Circuit agreed and dismissed the case. *In re Willy*, 831 F.2d 545 (1987).

The case was then returned to the ALJ. Willy dropped his production order request and presented his own copies of his various drafts of the Belcher Report to the ALJ. The ALJ allowed Willy's drafts to be introduced as evidence over Coastal's objections. In 1988, the

ALJ issued an opinion finding for Willy but granting no relief because of Willy's deception regarding his current employment and income. ALJ's November 29, 1988 Recommended Decision and Order ([attached](#)). Both parties appealed to the Secretary of Labor.

On June 1, 1994, the Secretary issued a Final Decision and Order (Sec'y Fin. D. & O.) ([attached](#)), finding for Willy and remanding the damages issue to the ALJ. The Secretary rejected Coastal's argument that Coastal's assertion of the attorney-client privilege precluded Willy from introducing his draft Belcher Reports into evidence and relying upon the contents of the reports in support of his claim that he engaged in conduct protected by the employee protection provisions. The Secretary stated:

Respondent excepted to the admission in evidence of annotated copies of Complainant's Belcher report, C-8 1 and 84, arguing that introduction of those exhibits was prohibited by Respondent's claim of attorney-client privilege. These documents were at the heart of Complainant's case and by admitting them in evidence, Respondent argues, the ALJ not only sanctioned the violation of the privilege but placed Respondent at an unfair disadvantage. Complainant was able to present his case through use of the exhibits, but Respondent could not rebut it through other privileged documents or by permitting its employees to answer questions about the exhibits without having waived the privilege.

Sec'y Fin. D. & O., slip op. at 7-8.

Citing proposed Supreme Court Standard 503 - Lawyer Client Privilege, the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, the Texas Disciplinary Rules of Professional Conduct and the Fifth Circuit's decision in *Doe v. A Corp.*, 709 F.2d 1043 (1983), the Secretary determined that the draft reports could be admitted as evidence under both federal and Texas law. *Id.* at 8-10. He specifically noted that "application of a privilege is a matter of federal law in a case such as this arising under the laws of the United States." *Id.* at 9 n.4. The Secretary then found for the Complainant on the merits and remanded the case to the ALJ to award remedial relief.

[Page 4]

The Secretary's 1994 decision reaffirmed his prior holding in *Willy v. Coastal Corp.*, Sec'y D. & O. of Rem., June 4, 1997, that Willy's internal complaint, the Belcher drafts, was protected, notwithstanding the Fifth Circuit's decision in *Brown & Root*. Also, the Secretary declined to continue the ALJ's March 15, 1988 order sealing the record.

The Fifth Circuit denied Coastal's petition for review of the Secretary's decision. *Coastal Corp. v Reich*, No. 94-40334. The Secretary denied reconsideration of his decision on July 13, 1995.

In 1997, the ALJ issued a Recommended Decision and Order on Damages, Fees, and Costs and a subsequent Order Recommending Correction of Recommended Decision and Order on Damages, Fees and Costs. The two orders of May 8 and December 14, 1987, are now before the Administrative Review Board.²

State Court Actions

In 1985 Willy filed a separate action against Coastal in the Texas State courts alleging wrongful discharge under Texas state law. Coastal removed the litigation to the Federal District Court on the basis of original federal question jurisdiction involving federal environmental statutes. In 1986, the Federal District Court dismissed the case for failing to state a Federal claim and ordered sanctions against Willy.³ *Willy v. Coastal Corp.*, 647 F.Supp. 116 (S.D. Tex).

In dismissing Willy's claim that he was fired because he required Coastal to comply with state and federal environmental laws, the District Court held that under the Texas Canons of Ethics and Disciplinary Rules, "[i]f an attorney believes that his client is intent upon pursuing an illegal act, the attorney's option is to voluntarily withdraw from employment." 647 F.Supp. at 118. However, when an attorney "elects not to withdraw and not to follow the client's wishes, he should not be surprised that his client no longer desires his services." *Id.* The court concluded that the withdrawal standard was the same for an in-house attorney such as Willy. *Id.*

Willy appealed to the Fifth Circuit which ruled that the case was not removable to federal court and sent the case back to the Texas state courts. *Willy v. Coastal Corp.*, 855 F.2d 1160 (1988). Following a trial on the merits, a Texas State jury found that Coastal wrongfully discharged Willy and awarded actual and punitive damages.

Coastal appealed to the Court of Appeals of Texas. In 1996 the Texas appellate court reversed the lower court and rendered judgment for Coastal, ruling that the Texas attorney-client confidentiality rules applied. *Willy v. Coastal States Management Co.*, 939 S.W.2d 193 (Tex. App. 1996). The Court held that Willy was not entitled to reveal confidential information to prove his claim of wrongful termination. Finding the since superceded Texas Code of Professional Responsibility applicable, the Court of Appeals of Texas stated:

We hold that an attorney's status as in-house counsel does not preclude the attorney from maintaining a claim for wrongful termination under *Sabine Pilot*⁴ if the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets.

* * * * *

Willy has provided no authority, and we can find none, to support his assertion that he is entitled to reveal confidential information in order to prove his claim of wrongful termination. We have held that Willy can

maintain a suit for wrongful termination only if his claim can be proved without any violation of his ethical obligation to respect client confidences and secrets. That obligation is defined by the Code, which contains no exception that allows the revelation of Coastal's confidences and secrets in this context.

939 S.W.2d at 200-01.

[Page 5]

On November 19, 1999, Coastal filed a Motion to Dismiss with the ARB, contending that the state judgment in Willy's separate Texas action for retaliatory discharge, *Willy v. Coastal States Management Co.*, 939 S.W.2d 193 (Tex. App. 1996), *writ dismiss'd*, 977 S.W.2d 566 (Tex. 1998), established a legal principle fatal to Willy's claims in this proceeding.

Need for Additional Briefing

This is the first case brought by a former in-house attorney under the whistleblower statutes at issue. The Board believes that additional review of attorney-client privilege and confidentiality issues is warranted to ensure that relevant legal authority and analysis are brought to the Board's attention. The "law of the case" doctrine does not preclude further consideration of the Secretary's June 1, 1994 ruling on these matters. The doctrine is discretionary and does not limit a court's power to reconsider its own decision prior to final judgment if its original ruling was erroneous. *Cristianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988); *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1197 (11th Cir. 1993); *In re U.S. Postal Service ANET and WNET Contracts*, ARB No. 98-13 1, slip op. at 12 (Aug. 4, 2000). *Cf. Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 517-18 (9th Cir. 1989).

In view of the importance of these matters for the adjudication and disposition of whistleblower discrimination complaints now investigated by the Assistant Secretary of Labor for Occupational Safety and Health under the environmental statutes at 29 C.F.R. Part 24(2002), the Board invites the Assistant Secretary to file an amicus brief to be submitted within 45 days of receipt of this notice. In addition, Complainant and Respondents are ordered to submit briefs within 45 days of receipt of this notice.

The briefs of the Assistant Secretary and the parties should address the following matters:

- 1) Does the attorney-client privilege apply to Willy's drafts of the Belcher Report?
- 2) Is there an exception to the applicable Federal common law or State law of attorney-client privilege for use of client confidences or secrets or

related attorney advise in establishing a claim under the federal whistleblower statutes at issue? *See Willy v. Coastal States Management Co., Inc.*, 939 S.W.2d 193 (Tex. App. 1996), *writ dismiss'd*, 977 S.W.2d 566 (Tex. 1998).

3) Is there an ethical duty of confidentiality to a client which the ARB has authority to apply to prevent Willy from introducing evidence or testimony obtained through his work on the Belcher Report?

4) Do the worker and public safety and environmental goals of the environmental whistleblower statutes involved in this case negate or modify the dictates of attorney-client privilege and/or attorney-client confidentiality? *See* 29 C.F.R. § 18.501 (2002) (ALJ hearing rule on privileges). *Cf.* Fed R Evid. 501 (2002).

[Page 6]

In responding to the above, the briefs of the Assistant Secretary and the parties should specify the Federal and/or State authority for the positions advanced.

The briefs of the parties in this case should also address the following matters:

1) Can Complainant establish that he engaged in protected activity if he is precluded from relying upon the draft Belcher report and/or testimony concerning its contents? *See Kachinar v. SunGard Data Systems, Inc.*, 109 F.3d 173, 180 (3d Cir. 1997) (quoting *General Dynamics Corp. v. Superior Court*, 87 P.2d 487, 490 (Cal. 1994)). Supply record citations.

2) Have Respondents waived the attorney-client privilege?

An original and four copies of all briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309, Washington, D.C., 20210.

Attachments

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
Dunlop Counsel

[ENDNOTES]

¹ The complaint was filed pursuant to the employee protection provisions of the Clear Air Act, 42 U.S.C. §7622 (1988), the Water Pollution Control Act, 33 U.S.C. §1367 (1988),

the Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (1988), the Resource Conservation and Recovery Act, 42 U.S.C. §6971 (1988), the Toxic Substances Control Act, 15 U.S.C. §2622 (1988), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1988).

² See Sec'y Ord. 1-2002, 67 Fed. Reg. 64272, (Oct. 17, 2002) (delegating authority to the Administrative Review Board to issue final agency decisions on questions of law and fact arising in an appeal under the whistleblower provisions of the environmental acts).

³ The United States Supreme Court subsequently upheld the District Court's authority to award sanctions against Willy although the District Court was later determined to lack subject matter jurisdiction. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992).

⁴ *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).